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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 559

THE CITY OF HUNTINGTON BEACH, A MUNICIPAL CORPORATION,

Petitioner,

vs.

E. C. DENIO, G. A. HART, G. P. TAUBMAN, JR., AND M. C. SIMPSON, PARTNERS, UNDER THE FIRM NAME AND STYLE OF DENIO, HART, TAUBMAN AND SIMPSON,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT AND BRIEF IN SUPPORT THEREOF.

To the Honorable Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, the City of Huntington Beach, a Municipal corporation, respectfully files and submits this as its Petition for a Writ of Certiorari to review a decision and judgment of the District Court of Appeal of the State of California, Fourth Appellate District.

Said District Court of Appeal on May 9, 1946, affirmed a judgment of the Superior Court of the State of California, in and for the County of Orange. Said judgment was in favor of the plaintiffs in said case, the Respondents herein, and against the Petitioner herein. The judgment was in the sum of Nineteen Thousand Seven Hundred and Eighteen and 83/100 dollars ($19,718.83) plus interest and costs. The opinion of said Court is found in the Record at page 70, and is also reported in 74 *A. C. A.* at page 465.

A petition for rehearing in said District Court of Appeal was filed within the time allowed by law and was denied without opinion on May 27, 1946 (R. 93).

A petition for hearing by the Supreme Court of the State of California was filed within the time allowed by law and was denied, without opinion, by that Court on July 2, 1946 (R. 96).

The issuance of remittitur by said District Court of Appeal has been stayed by proper order and the cause is now filed and docketed herein for decision.

Summary Statement of Matters Involved

Throughout this petition and the brief in support thereof, reference will be made to the clerk's and reporter's transcripts in the former case. These were bound together and received in evidence as plaintiff's Exhibit No. 1 in this case (R. 46, 57, 60). They will hereafter be referred to as "Exh. 1", "Cl. Tr.", or "Rep. Tr.", as the case may be.

In 1937, your petitioner was a California Municipal corporation of the sixth class, (R. 66, 67) situated on the seashore. Respondents were attorneys-at-law (R. 27). For the sake of clarity, we will refer to your petitioner as the City, and to Respondents as the plaintiffs.

The city was claiming rights in the oil, gas and other

hydro-carbon substances in the tide and over-flow lands within the city. It was anxious to have these rights finally determined either by legislative action or by a decision of the highest court of the land (Exh. 1, Rep. Tr. pages 289-290, 294, 317, 326-327, 395, 453, 454, 461).

Negotiations were had between the City and the plaintiffs looking towards plaintiffs acting as special counsel for the City in this connection. During these negotiations, plaintiffs informed the City that they would go into the matter generally to find out some way to get what the City felt was its just rights and that it might involve extensive litigation lasting over years and years and including the taking of a suit to the United States Supreme Court (Exh. 1, Rep. Tr. pages 78, 81-83, 179-180, 184, 188). It was finally agreed that plaintiffs should be so employed as special counsel and should receive a cash retainer fee of Two Thousand Five Hundred Dollars ($2500.00) which was paid in full and also certain percentage interests in any recovery which might be had (Exh. 1, Rep. Tr. pages 324-325).

Meanwhile, to assist in the obtaining of the City's rights to this oil, the City Attorney had practically completed the draft of the new City Charter (Exh. 1, Rep. Tr. pages 324-325, 390, 396, 397, 410-413, 447, 451).

The cash retainer to plaintiffs was primarily to cover services of plaintiffs in connection with the final draft of this new charter and in making an investigation into the law concerning the right of the City to such oil. The percentages allowed plaintiffs were primarily the compensation plaintiffs were to receive for the protracted litigation which they foresaw (Exh. 1, Rep. Tr. pages 324-325, 362-363).

The contract as finally reduced to writing provided for the cash retainer and certain percentages of royalties re-

ceived by the city from such oil, gas or other hydro-carbon substances, as follows: ten percent, if received within two years, fifteen percent if received during the next three years and twenty percent if received during the next ten years. This contract which took the form of a letter written by plaintiffs to the City and accepted by it, did not segregate the services to be rendered for the cash retainer from those to be rendered for the percentages (R. 27-30).

Within a month after the contract was entered into, the plaintiffs, Mr. Denio and Mr. Taubman, made two short trips to Sacramento, the state capital. As a result of these trips, they became convinced that no such legislation could be obtained and that no further efforts should be made in that respect (Exh. 1, Rep. Tr. pages 62-65, 95, 97, 248, 259-260, 262).

No litigation whatever was instituted and plaintiffs determined that it would be useless to do so. When plaintiffs so informed the City is not clear from the record, but the advice against litigation was given or reiterated on January 3, 1938. After this date, plaintiffs rendered the City no further services (Exh. 1, Rep. Tr. pages 72-73, 150-151, 202, 425, 428, 461).

Two years prior to the employment of plaintiffs by the City, it had entered into an oil and gas lease with the Southwest Exploration Company. Certain disputes had arisen between the City and this company. Some ten months after plaintiffs had informed the City that litigation would be useless and had ceased to render any services to the City, a compromise was entered into between the City and the Southwest Exploration Company. The plaintiffs had had nothing whatever to do with the lease to, the disputes with or the settlement with that company (Exh. 1, Rep. Tr. pages 369-370).

Between the date of said settlement and June 28, 1939, the

City had received, under said settlement, from said Southwest Exploration Company, the sum of $27,940.90. All of this sum was received within two years from the date of the contract between plaintiffs and the City. Plaintiffs thereupon instituted a suit against the City for ten percent of this amount, namely $2,794.09 (Exh. 1, Cl. Tr. pages 1-16). It was never disputed by the City that if the plaintiffs were entitled to recover the contract percentage, then the amount of their recovery should be the amount sued for, namely $2,794.09. The City, however, contested plaintiff's right to any recovery (Exh. 1, Cl. Tr. pages 60-71). The case was tried before a jury and resulted in a verdict for the plaintiffs for $2,000.00, for which sum judgment was entered (Exh. 1, Cl. Tr. pages 72-74). This sum of $2,000.00 did not correspond to any amounts specified in the contract either by way of percentages or otherwise. On appeal, the California Supreme Court affirmed the judgment. (*Denio* v. *City of Huntington Beach*, 22 Cal. 2d. 580, 140 Pac. 2d. 392, Plfs. Exh. 6, R. 51, 52, 58).

Meanwhile the City received further payments from the Southwest Exploration Company. Following the decision of the State Supreme Court in the above case, the plaintiffs instituted the present suit to recover ten percent of the money so received up to November 1940, and fifteen percent of the remainder (R. 1-9).

The complaint in this present action alleged amongst other matters that the former action constituted *res judicata* in favor of the plaintiffs to the effect that they were entitled to recover the full contract percentages provided for in said contract.

The answer, as amended, alleged, amongst other matters, that the former action constituted *res judicata* that the plaintiffs were entitled to no more than the cash retainer and the $2,000.00 awarded them in said former action and

that said sum plus said cash retainer constituted the reasonable value of the services of the plaintiffs. In addition, the answer as amended, alleged that the contract was induced by fraud, and that it had terminated by reason of the frustration of its principal object, namely prosecution of litigation to establish the rights of the City. These defenses had not been raised or litigated in the former action (R. 9-26).

The answer also contained the defenses that any award to the plaintiffs against the defendant would deprive the defendant of its property without due process of law in violation of the provisions of the XIVth Amendment to the Constitution of the United States and would do so in that the cash retainer paid plaintiffs plus the amount awarded to plaintiffs in the former action was as much as the amount actually earned by plaintiffs under said contract; that it was in excess of the reasonable value of plaintiffs services; and that the award of any further or greater sum to the plaintiffs would constitute an award of exemplary damages against the defendant; and that the award of any further sum to plaintiffs would constitute an award of exemplary damages against the defendant; and that the award of any further sum to plaintiffs would constitute a gift by defendant to plaintiffs. It was further alleged that if the judgment in the former action had the effect claimed by plaintiffs it would amount to a deprivation of the defendant of its property without due process of law in violation of the said XIVth Amendment (R. 16-18).

By stipulation, the question as to the effect as *res judicata* of the judgment in the former action was heard first by the Trial Court. The case was argued upon the theory that the causes of action in the two cases were not the same. The Trial Court concluded that the judgment in the former action constituted *res judicata* in favor of the plaintiffs

that they were entitled out of all receipts from the Southwest Exploration Company to the full percentages specified in the contract. Based solely on this conclusion, it rendered judgment in favor of the plaintiffs for said full percentages (R. 59, 63, 64, 32-34).

On appeal, the District Court of Appeal affirmed this judgment, but did so on the basis that the two causes of action were substantially the same; that therefore the judgment in the first action constituted *res judicata* as to the second action as to all matters which might have been litigated in that first action, whether or not they were raised and actually determined; and that it constituted *res judicata* that plaintiffs were entitled to the full percentages specified in the contract (R. 70-78).

On petition for rehearing in that court and again upon petition for hearing in the Supreme Court of the State of California it was urged that the holding of the District Court of Appeal constituted a violation of the provision of the XIVth Amendment to the Constitution of the United States in that it deprived the defendant of its property without due process of law and denied to the defendant the equal protection of the laws of the State of California (R. 78, 79, 81-83, 94-96).

Questions Presented

I

Does the award in the present case to the plaintiffs of the sum of $17,718.93 plus interest and costs deny to the defendant the equal protection of the laws of the State of California in violation or said XIVth Amendment?

II

Does it deprive the defendant of its property without due process of law in violation of the provisions of the XIVth Amendment to the Constitution of the United States?

Reasons Relied upon for the Granting of the Writ

I

The judgment in the former action was partially in favor of the plaintiffs therein, inasmuch as it awarded them $2,000.00. It likewise was partially in favor of the defendant therein, in that it failed to award to plaintiffs the balance of $794.09 required to equal the ten per cent specified in the contract.

The state courts in this case have applied said judgment as *res judicata* in favor of the plaintiff but have declined to apply it as *res judicata* insofar as it is in favor of the defendant, thus denying to the defendant the equal protection of the laws of this state.

II

The judgment in the present action for the full contract percentages is based *solely* upon the proposition that an award in the former action to plaintiffs of less than any such contract percentage established conclusively and forever thereafter that plaintiffs, without performing any additional services, are entitled to the full contract percentages. The judgment in the present case, therefore, at least, insofar as it awards, for the same initial two year period, a percentage in excess of that awarded in the former action, deprives the defendant of its property without due process of law.

III

The judgment in the first action constitutes a determination that plaintiffs were entitled only to recover the reasonable value of their services and that such reasonable value amounted to the cash retainer plus the sum of $2,000.00 and no more.

IV

Any award to the plaintiffs of any additional sum for the same services involved in that first action, and plaintiffs have rendered no other or further services, would amount either to the awarding of exemplary damages or to compelling the defendant to make a gift of its property to the plaintiffs.

V

Exemplary damages can not, under the laws of the State of California be awarded in such an action as this.

VI

Exemplary damages can not be awarded under the laws of the State of California against a Municipal corporation.

VII

A Municipal corporation may not make a gift, and much more, may not be compelled to make a gift of its property.

Your Petitioner presents herewith as part of this Petition a Brief setting forth more fully their views on the questions involved and also a Transcript of the Record of District Court of Appeal. The original exhibits in this case have been forwarded to the Clerk of this Honorable Court by the Clerk of said District Court of Appeal and are consequently available for consideration in connection with this petition.

WHEREFORE, your petitioner respectfully prays that a Writ of Certiorari may be issued out of and under the seal of this Court directed to the District Court of Appeal of the State of California, Fourth Appellate District, commanding the said Court to certify and send to this Court on a day certain to be therein designated, a full and com-

plete transcript of the record and all proceedings in said District Court of Appeal in said case entitled therein "E. C. Denio, G. A. Hart, G. P. Taubman, Jr., and M. C. Simpson, partners, under the firm name and style of Denio, Hart, Taubman and Simpson, plaintiffs and respondents, vs. The City of Huntington Beach, a municipal corporation, defendant and appellant," numbered Fourth Civil No. 3408 in said Court, to the end that said case may be reviewed and determined by this Court, and that the said judgment of the said District Court of Appeal in said case may be reviewed by this Honorable Court, and that your petitioner may have such other and further relief or remedy in the premises as to this Honorable Court may seem meet and just.

THE CITY OF HUNTINGTON BEACH,
a Municipal Corporation,
By TED W. BARTLETT,
Mayor;
WALTER O. SCHELL,
Counsel.

FRANK C. DRUMM,
GERALD F. H. DELAMER,
RAY H. OVERACKER,
Of Counsel.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

(I.)

The Opinion of the Court Below

The opinion of the District Court of Appeal of the State of California, Fourth Appellate District, is found in the record at page 70. It is also reported in 74 *A. C. A.* at page 465.

No opinion was rendered by that court on the petition for rehearing therein, nor was any opinion rendered by the Supreme Court on petition for hearing in that court.

(II.)

Jurisdiction

The decision of the District Court of Appeal was rendered on May 9, 1946 (R. 70). The order denying a rehearing on that case was rendered on May 27, 1946 (R. 93). The order denying a hearing by the Supreme Court of the State of California was rendered on July 2, 1946 (R. 96).

The jurisdiction of this court is involved under section 237(b), as amended, of the judicial code (28 U.S.C.A. par. 344). The petition is filed in accordance with rule 38 of this court.

(III.)

Statement of the Case

A summary of the case will be found under the heading, "Summary Statement of the Matter Involved" in the petition for Writ of Certiorari to which this brief is annexed. In the interest of brevity the statement will not be repeated.

(IV.)

Specification of Errors

1. The decision of the District Court of Appeal denies the defendant the equal protection of the laws of the State of California in that it applies the judgment in the former action, which was partially in favor of the plaintiffs, as *res judicata* wholly in their favor and at the same time refuses to apply said judgment, which was partially in favor of the defendant, as *res judicata* at all in favor of the defendant.

2. The decision of the District Court of Appeal deprives the defendant of its property without due process of law in that solely because of a former judgment awarding plaintiffs *less than* any percentage specified in the contract, that decision awards to the plaintiffs *the full* percentages specified in that contract.

3. The decision of the District Court of Appeal further deprives the defendant of its property without due process of law in that:

(a) It compels defendant to make a further payment to the plaintiffs for the same services after plaintiffs have been paid by the defendant the full reasonable value of those services,

(b) It amounts to an award of exemplary damages against the defendant, and

(c) Such further payment would amount to a gift from the defendant Municipal corporation to the plaintiffs.

4. In each of the above respects the decision of that court violates the provisions of the XIVth Amendment to the Constitution of the United States.

(5) ARGUMENT

Point 1

The decision of the District Court of Appeal denies the defendant the equal protection of the laws of the State of California.

In California, as elsewhere, a distinction is made between the effect of a judgment in a subsequent case, based on the same or different causes of action.

Thus it is said in *Panos* v. *Great Western Packing Co.*, 21 Cal. 2d. 636, 638; 134 Pac. 2d. 242-243:

> "In applying the doctrine the cases recognize a distinction between the effect of a judgment operating by way of *estoppel* in a later action upon a *different* cause of action and one operating by way of *bar* against a second action upon the *same* cause of action. (*Sutphin* v. *Speik*, 15 Cal. 2d. 195, 201; 99 P. 2d. 652, 101 A.L.R. 497; *Todhunter* v. *Smith*, 219 Cal. 690, 695; 28 P. 2d. 916; *Horton* v. *Goodenough*, 184 Cal. 451, 461; 194 P. 34; and authorities collected in 15 Cal. Jur. 136, sec. 189; 30 A. Jur. 912, sec. 167; 2 Freeman on Judgments, p. 1425, sec. 676.) This distinction entails important consequences in the determination of what matters were adjudicated by the former judgment, and the failure to observe it has been the occasion of confusion and error. As stated in 2 Freeman on Judgments, *supra*, 'A prior judgment can operate as a complete bar to a second action only on the theory that it is a conclusive adjudication . . . as to every matter that might be urged in support of the latter . . . Under such circumstances, in view of the rule and policy of the law which forbids a party to split his claim, the judgment is deemed to adjudicate, for purposes of the second action, not only every matter which was, but also every matter which might have been urged in support of the cause of action or claim in litigation. Where the cause of action in the second action is the same as that in the first action, a

> final judgment in the latter upon the merits is a complete bar to the maintenance of the second action.' To the same effect see Restatement of the Law of Judgments, section 63, comment a."

Up to the rendition of the decision of the District Court of Appeal, it had been assumed by all parties and by the Trial Court that the causes of action sued upon in the two cases were separate. The question therefore presented to and passed upon by the Trial Court was the effect of the former judgment, not as a bar to further litigation, but as an estoppel conclusively determining certain facts. The Trial Court held, erroneously we believe, that the evidence which consisted of the record in the previous case established that the plaintiffs were entitled to the full contract percentages set forth in the contract.

The question presented after the rendition by the Trial Court of its findings of fact, conclusions of law and judgment, was in essence the sufficiency of the evidence to support those facts, that is its sufficiency to establish such estoppel.

The District Court of Appeal held that the causes of action in the two cases were the same. Thus, it approved the following definition of a cause of action (R. 76):

> "The cause of action is simply the obligation sought to be enforced,"

and then continues (R. 76):

> "In a very real sense this action involves the same obligation which was litigated in the former action. * * * The validity and binding effect of the contract for services was the basic issue in the former action and is the basic issue in the present action."

Again, the District Court of Appeal says (R. 77):

> "The basic facts and the existence of the obligation here sued upon had been judicially determined, and the final judgment in the former action is controlling here."

The Trial Court permitted re-litigation of the matters involved in the former action, though it held, erroneously we believe, that certain evidence, namely the record in that former action, conclusively established by way of estoppel all facts necessary to support a judgment for plaintiffs for the full contract percentages.

If, as held by the District Court of Appeal, the causes of action in the two cases were the same, then the judgment in the former judgment operated, not as a mere estoppel establishing the facts therein determined, but as a legal bar to further litigation of all matters therein involved whether they were actually litigated or determined in that former action.

The holding of the District Court of Appeal could not have been anticipated by the defendant, your petitioner. In the first place, no such claim had theretofore been made in the case. In the second place, the settled law of California seemed to be to the contrary.

Thus it had been said by the California Supreme Court in the case of *Sutphin* v. *Speik*, 15 Cal. 2d. 195, 202; 99 Pac. 2d. 652, 655:

> "In the instant case, for example, the several instalments of royalties due, give rise to separate causes of action."

See also *English* v. *English*, 9 Cal. 2d. 358; 70 Pac. 2d. 627, 628, and *Cromwell* v. *County of Sac.* 94 U. S. 352, 24 L. E. 195, 197.

The effect of the holding of the District Court of Appeal completely changes the picture. The judgment in the first case no longer merely creates an estoppel determining certain facts. The decision of the second action no longer depends upon the determination of questions of fact. It becomes solely one of law, namely the application of the former judgment as a complete bar to further litigation of a cause of action or of defense thereto.

It will be remembered that the judgment in the first case was not wholly in favor of the plaintiffs. It was partially in favor of the defendant. It is the contention of the defendant, your petitioner, that if that judgment operates as a bar, it does so against both parties. In so far as that judgment was in favor of the plaintiffs it operates as a bar against the defendant. However, in so far as that judgment was in favor of the defendant, it operates as a bar against plaintiffs.

The District Court of Appeal applies the judgment as a bar against the defendant. It refuses to apply it as a bar against plaintiffs. We submit that this amounts to a denial to the defendant of the equal protection of the laws of the State of California in violation of the provisions of the XIVth Amendment to the Constitution of the United States, and that this is a situation which appeared in the case for the first time when the District Court of Appeal rendered its decision. This point was specifically called to the attention of the Court at the first opportunity so to do, namely, upon your petitioner's petition for rehearing before the District Court of Appeal (R. 78, 79, 81-83). It was again called to the attention of the Court upon your petitioner's petition for hearing before the Supreme Court of the State of California (R. 94-96). It is therefore available to your petitioner upon this petition for Writ of Certiorari.

In support of our contention that the judgment in the former action, if it operates as a bar at all, operates partially in favor of the defendant, we would call the attention of this Honorable Court to the following facts and authorities:

The plaintiffs in the former action sued for the full percentage provided for in the contract. Admittedly, this percentage amounted to $2,794.09. The defendant denied

any liability whatever to the plaintiffs. The jury found, and judgment was rendered in favor of plaintiffs for $2,000.00, which corresponds to no amount specified in the contract whether as a percentage or otherwise.

In *Donnetin* v. *Union Hardware and Metal Co.*, 38 Cal. App. 8; 175 Pac. 26, a jury awarded the plaintiff $1.00 damages for personal injuries and judgment was entered for that sum. In affirming the denial of a motion for new trial on the issue of damages alone, the court held that the award of $1.00 was equivalent to a judgment that the plaintiff was entitled to no more than this sum.

In *Lady* v. *Ruppe*, 113 Cal. App. 606, 608; 298 Pac. 859, 860, it is said:

> "The plaintiff here prayed for $4,000. A verdict of a lesser amount in a general verdict is a finding that the allegations relative to the value were untrue, but that some value attached which, from all the evidence, the jury was able to fix. A general verdict in favor of a party, unless wholly unsupported by the evidence, is a finding in favor of those facts essential to a recovery as shown by the verdict, but not necessarily a finding that all the allegations are true relative to the recovery which the party sought. In this case the jury was convinced that the services had been rendered, but not convinced that those services were of the value of $4,000. The jury was convinced that services had been rendered at the special instance and request of defendant, but evidently not convinced that all the services had been rendered at the special instance and request of defendant."

See also *Thompson* v. *McKay*, 41 Cal. 221, 227, *Lamb* v. *Wahlenmaier*, 144 Cal. 91, 94; 77 Pac. 765, 766; *Soule* v. *Soule*, 4 Cal. App. 97, 106, 87 Pac. 205, 208; *Calegaris* v. *Calegaris*, 4 Cal. App. 264, 266; 87 Pac. 561, 562.

The judgment in the first action in the present litigation, therefore, amounted to a judgment that the plaintiffs had

rendered the defendants services at their special instance and request of the value of the cash retainer, plus $2,000, and that the plaintiffs were entitled to recover said additional sum of $2,000. It was likewise, in legal effect, a judgment that for said services, the plaintiffs were not entitled to recover any greater sum. Admittedly, the plaintiffs rendered no other or further services to the defendant.

The judgment in that first action had two effects. One in favor of the plaintiffs, the other in favor of the defendant. The District Court of Appeal applied the first aspect of the judgment as *res judicata* in favor of the plaintiffs. It refused to apply the second aspect as *res judicata* in favor of the defendant. If the plaintiffs were entitled to the application of this doctrine in so far as the judgment in the first action was in their favor, the defendant was equally entitled to a similar application of the doctrine in so far as that same judgment was partially in its favor.

Our point is strongly emphasized by the very wording used by the District Court of Appeal in its opinion. That Court says (R. 76):

> "If that contract is valid and enforceable to the extent of requiring the payment of a percentage of moneys received from a certain source for a certain period, it would be entirely inconsistent to hold that a judgment upholding that contract for a part of the period provided for, had no binding effect on the claim for compensation for the remainder of the period covered by the contract."

Assuming that the Court is correct in the above statement, it is then equally inconsistent to hold that the judgment that the plaintiffs were *not* entitled to the *entire* contract percentages had no binding effect on the claim for compensation for the remainder of the period covered by the contract.

Again, the District Court of Appeal says (R. 77):

> "The basic facts and the existence of the obligation here sued upon had been judicially determined and the final judgment in the former action is controlling here. A contrary decision here would have destroyed the rights of the respondents in a contract, the validity and binding effect of which was upheld in the former action."

Again, assuming the Court is correct in the above statement, since the judgment in the former action determined that the plaintiffs were *not* entitled to the full contract percentages, the judgment in the present case for such full contract percentages destroys the rights of the defendants, your petitioner, in respect to said contract, which rights were determined in that former action.

The District Court of Appeal also states that certain facts were established by the judgment in the former action and that these facts cannot be disputed in the present action. In other words, the Court refers to the operation of a judgment as an estoppel rather than as a bar. If, however, as the Court held in the preceding paragraph, the causes of action were the same, then there is no requirement for the application of any such estoppel. The matters involved simply cannot be re-litigated.

The District Court of Appeal says (R. 76, 77):

> "It is well settled that a judgment or a decree necessarily affirming the existence of any fact is conclusive upon the parties or their privies whenever the existence of that fact is again in issue between them, not only when the subject-matter is the same, but when the point comes *incidentally* in question in relation to a *different* matter in the same or any other court (citing authorities), that is to say 'a matter of fact once adjudicated by a court of competent jurisdiction, concurrent or exclusive, may be relied upon as an estoppel in any

> subsequent collateral suit in the same or any other court, at law, in chancery, in probate, or in admiralty, when either party, or the privies of either party, allege anything inconsistent with it, and this too whether the subsequent suit is upon the same or a different cause of action. The facts decided in the first suit cannot be disputed.' (Citing authorities)."

A fact established by a former judgment is that plaintiffs are *not* entitled to recover the entire contract percentages. This fact cannot be subsequently disputed. A contrary decision destroys the rights of the defendant as established by that former judgment, namely, its right not to be mulcted the full contract percentages for services to have been rendered upon a contract, but which services were not rendered because of the express advice of plaintiffs themselves.

We respectfully submit that where a judgment is partially in favor of the plaintiff and partially in favor of the defendant, that judgment cannot have the same effect as though it had been wholly in favor of the plaintiff, yet this is exactly what the District Court of Appeal holds to be the effect of the judgment in the former action.

We submit that where a judgment is partially in favor of a plaintiff and partially in favor of a defendant, to apply the doctrine of *res judicata* to that judgment in favor of the plaintiff, and at the time to refuse to apply the doctrine in favor of the defendant in so far as that judgment was favorable to that defendant, is to deny to that defendant the equal protection of the laws.

We heretofore submit that the decision of that Court holding that the basic issue and causes of action in the two cases are the same, applying the principle of *res judicata* in favor of the plaintiffs, but denying the application of said principle in favor of the defendant, was a denial to the defendant of the equal protection of the laws of the State

of California in violation of the constitutional rights of the defendant secured to him by said XIV Amendment to the Constitution of the United States of America.

The provisions of the XIVth Amendment to the Constitution apply to the acts of the judiciary as well as to those of the legislative. Thus it is said in *C. B. & Q. R. R. Co.* v. *Chicago*, 166 U. S. 226, 233, 41 L. Ed. 797, 983:

> "Now the right in question was distinctly asserted by the defendant in its written motion to set aside the verdict and grant a new trial. Among the grounds for a new trial were the following: That the several rulings of the court in excluding proper evidence for the defendant, the statute under which the proceedings for condemnation were instituted, and the verdict of the jury and the judgment based upon it, were all contrary to the 14th Amendment declaring that no state shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its limits the equal protection of the laws.
>
> "When the trial court overruled the motion for a new trial and entered judgment it necessarily held adversely to these claims of Federal right."

See also *Louisiana* v. *Board of Assessors*, 167 U. S. 409, 414, 42 L. Ed. 215, 221, quoted from under the next point made in this argument.

POINT 2

The decision of the District Court of Appeal deprives the defendant of its property without due process of law in that a judgment in favor of a party for an amount less than a certain percentage of receipts bars the opponent from thereafter contesting the right of that party under identical facts to the entire percentage.

The contract provided for the payment to plaintiffs of 10% of royalties received by the defendant during the first

two years of the term of the contract. In the former action, plaintiffs sued for this amount. The defendant denied that the plaintiffs were entitled to anything under that contract, but neither set up nor claimed any offsets against the sums represented by that percentage. The judgment in that former action was for approximately 7.1% of the amounts received by the defendant as royalties from the Southwest Exploration Company.

Assume, as held by the District Court of Appeal, that the causes of action in the two actions were the same, the maximum effect of the judgment in the former action would be to operate to bar the defendant from contesting the right of plaintiffs to such 7.1% of royalties received during the remainder of the life of the contract. It could go no further. It could not bar the defendant from contesting plaintiff's right to receive any excess over that percentage.

What "process of law" is employed to deprive the defendants of the additional 2.9% of these monies? The first action cannot be relied upon as such "process of law" since it did not adjudge plaintiffs entitled thereto. In fact, it adjudged directly to the contrary. The second case cannot be relied upon as "process of law" to deprive the defendant of that additional 2.9%, since under the holding of the District Court of Appeal the defendant was barred from introducing its defenses in that second action.

At least as regards the excess of over 7.1%, the decision of the District Court of Appeal deprives the defendant of its property without due process of law in violation of the provisions of the XIVth Amendment to the Constitution of the United States, in that it takes away from the defendant 2.9% of royalties received by it without any trial of the facts in any case in which it was adjudged that plaintiffs were entitled to that 2.9%.

Thus it is said in *Louisiana* v. *Board of Assessors*, 167 U. S. 409, 414, 42 L. Ed. 215, 220:

> "The fundamental conception of a court of justice is condemnation only after hearing. To say that courts have inherent power to deny all right to defend an action and to render decrees without any hearing whatever is, in the very nature of things, to convert the court exercising such an authority into an instrument of wrong and oppression, and hence to strip it of that attribute of justice upon which the exercise of judicial power necessarily depends."

And again at page 418 of U. S. and page 221 of L. Ed.:

> "Can it be doubted that due process of law signifies a right to be heard in one's defense? If the legislative department of the government were to enact a statute conferring the right to condemn the citizen without any opportunity whatever of being heard, would it be pretended that such an enactment would not be violative of the Constitution? If this be true, as it undoubtedly is, how can it be said that the judicial department, the source and fountain of justice itself, has yet the authority to render lawful that which if done under express legislative sanction would be violative of the Constitution. If such power obtains, then the judicial department of the government sitting to uphold and enforce the Constitution is the only one possessing a power to disregard it. If such authority exists then in consequence of their establishment, to compel obedience to law and to enforce justice, courts possess the right to inflict the very wrongs which they were created to prevent."

In *American Surety Co.* v. *Baldwin*, 287 U. S. 156, 168, 77 L. Ed. 231, 239, it is said:

> "Due process requires that there be an opportunity to present every available defense . . .'

In *Riverside, etc.* v. *Menefee,* 237 U. S. 189, 193, 59 L. Ed. 910, 912, is is said:

> "That to condemn without a hearing is repugnant to the due process clause of the 14th Amendment needs nothing but the statement."

This point again was pointed out to the Court upon the first opportunity so to do, that is, upon the petition for rehearing in the District Court of Appeal (R. 78, 79, 81-83). It was again pointed out on petition for hearing in the Supreme Court of the State of California (R. 94-96).

Point 3

The judgment in this case deprives the defendant of its property without due process of law in that it either constitutes an award of exemplary damages to the plaintiffs or compels the defendant to make a gift of its property to plaintiffs.

A

The Judgment in the Former Case Was for the Reasonable Value of Plaintiff's Services

This point was raised in the answer of the defendant (R. 24, 25).

Where a complaint in one count sets forth in detail a transaction and then in a second count seeks the same recovery upon a common count, *in the absence of any contention to the contrary,* they are presumed to relate to the same subject matter and if a demurrer to the detailed count is sustained, it will also be sustained as to the common count. On the other hand, though relating to the same transaction, each of the counts may be predicated upon an entirely different theory of recovery. (*Kirk* v. *Culley,* 202 Cal. 501, 261 Pac. 994; *Kirk* v. *Bohlen,* 202 Cal. 511, 261 Pac. 998).

The complaint in the former case consisted of two counts. The first was on the express written contract. The second was a common count (Exh. 1, Cl. Tr., pages 1-10, 10-11).

The defendant interposed a demurrer to each count. It was sustained as to the first count and overruled as to the second (Exh. 1 Cl. Tr., page 24). By obtaining these different rulings of the court on the two counts, the plaintiffs estopped themselves from claiming that they were in fact both based on the same written contract. (*Estate of Davis*, 38 Cal. App. 2d, 579, 584, 101 Pac. 2d. 761; *John S. Spohnts* v. *Bender*, 18 Cal. App. 2d 447, 451, 64 Pac. 2d, 152; *Donegan* v. *Los Angeles*, 109 Cal. App. 673, 684, 293 Pac. 912.)

Plaintiffs then filed an amended complaint making slight changes in the first count, but none in the second count. (Exh. 1, Cl. Tr., pages 28-37, 37-38). Again the defendant demurred to each count, but this time the demurrers were overruled (Exh. 1, Cl. Tr., pages 44-50, 51).

Upon the trial of the former action and in the presence of the jury, plaintiffs were asked if they were willing to withdraw the second count of the amended complaint or to state that they were relying solely upon the contract set forth in that first count. They refused so to do (Exh. 1, Rep. Tr., page 9).

Defendant's counsel then made an objection to the introduction of certain evidence but stated that in view of the refusal of plaintiffs to admit that the two counts were in fact upon the same cause of action, he believed the objection was only good in so far as the first count was concerned. He therefore stated that he was not making the same objection in so far as the second count was concerned. Plaintiffs' counsel made no comment (Exh. 1, Rep. Tr., page 12).

In attempting to prove their case the plaintiffs did not confine themselves to the contract, but introduced evidence of the preliminary negotiations for said contract, of the services rendered by them, of their opinion that the State

of California owned the oil, of their advice that it would be impossible to obtain favorable legislation, and of their further advice that it would be useless and disadvantageous to start any litigation. The evidence as to the services rendered by plaintiffs was given in very great detail and, in fact, constitutes the major portion of the evidence introduced by plaintiffs in that case (Exh. 1, Rep. Tr., especially, pages 78-83, 132-133, 180-184, 204-205, 259-260).

As was pointed out in the "Brief Summary of the Case" in the petition, plaintiffs themselves admitted that they had informed the defendant that they foresaw extensive litigation lasting over years and years.

Amongst the testimony of the plaintiffs were two very significant items. Mr. Denio testified that on April 3rd he had a conference with the defendant at which it was agreed that plaintiffs' fee was to be reduced in the event there would be no protracted litigation (Exh. 1, Rep. Tr., pages 65-66, 99).

The written contract provided that plaintiffs would act as special counsel for the City "in all suits and legal matters in connection with your proposed assets to obtain the City's just control and return from the oil . . ." (R. 27, 28).

With reference to certain *quo warranto* proceedings, Mr. Denio testified that these proceedings had to do with the situation concerning the rights of the City in the oil. Nevertheless he further testified that he advised the City that his firm would be pleased to represent the City in connection with these proceedings only if special arrangements were made and his firm were retained so to do. He stated that otherwise his firm had no interest therein (Exh. 1, Rep. Tr., pages 70-72).

The above evidence certainly would have justified the jury in determining that plaintiffs themselves considered the contract to have been terminated by mutual consent

because of the decision not to institute litigation and that, consequently, plaintiffs were only entitled to the reasonable value of their services.

Although admittedly ten per cent of the monies received by the defendant amounted to the sum of $2,794.09, the trial court was not asked to give and gave no instruction to the jury that their verdict should either be for the plaintiffs in that sum or should be for the defendant.

It did, however, instruct the jury that if they found that the plaintiffs were discharged by the City without just cause, they were not limited to the reasonable value of their services but were entitled to recover the full contract percentage (Exh. 1, Rep. Tr., pages 505, 508-510). It further instructed the jury that if they found that the plaintiffs abandoned their contract prior to October 8, 1938, or had failed to carry out all of their material obligations under the contract, then the verdict should be for the defendant (Defendant's Nos. 4, 5, 7 and 11, Exh. 1, Rep. Tr., pages 524, 525, 527, 534).

The jury returned a verdict in the sum of $2,000.00 (Exh. 1, Cl. Tr., page 72).

Plaintiffs did not request that the jury be sent back to reconsider this verdict. The defendant made a motion for a new trial, which motion was opposed by plaintiffs. Plaintiffs did not appeal from the judgment, which, of course, was in the sum of $2,000.00. Defendant City, however, did take an appeal from that judgment. Plaintiffs opposed this appeal (Exh. 1, Cl. Tr., page 75-76, 78-79).

As there was no claim whatsoever that any other express contract existed between the plaintiffs and the defendant than the one referred to in the first count, plaintiffs' entire conduct of the case from the opposition to the sustaining of the demurrer to the second count of their original complaint down to their failure to request that the jury be sent out to

reconsider their verdict and their acceptance of the judgment of $2,000.00, can only mean that plaintiffs had carefully left open a claim that their second count was based upon an implied or *quasi* contract. The only implied or *quasi* contract which could have existed between plaintiffs and the defendant was one for the reasonable value of the services rendered to defendant by the plaintiffs. Such *quasi* contract, however, would arise in the event that the express contract had become terminated without fault by either party, such as by mutual consent on account of the abandonment of its primary object. (*Mineral Park Land Co.* v. *Howard,* 172 Cal. 289, 293, 156 Pac. 458, 459-460; *Johnson* v. *Atkins,* 53 Cal. App. 2d 430, 431, 127 Pac. 2d 1027, 1028; *LaCumbra Golf & Country Club* v. *Santa Barbara Hotel,* 205 Cal. 442, 271 Pac. 476; *Hackenfield & Co.* v. *Castle,* 186 Cal. 53, 57, 198 Pac. 1041, 1042; *Williston on Contracts,* Sec. 1948.

Unquestionably, in view of the testimony of Mr. Denio, the instructions of the court and the amount of their verdict, the jury determined that the contract had been terminated by mutual consent and that plaintiffs were only entitled to the reasonable value of their services, which reasonable value they fixed in the sum of $2,00.00 in addition to the cash retainer already paid. This they were privileged to do. (*Liebenguth* v. *Priester,* 64 Cal. App. 2d, 343, 345, 148 Pac. 2d, 893, 895 and cases cited therein).

The verdict of the jury could only have been based upon:

(a) An arbitrary award not founded upon anything, or
(b) A contract percentage, or
(c) The reasonable value of the services rendered.

Considering each alternative basis, we submit:

(a) The presumption is that the jury did not make a purely arbitrary award, so that if there is any other

possible basis for the amount of their verdict, such must be presumed to have been the basis adopted by them.

(b) The verdict was not based upon the contract percentage since the uncontradicted evidence showed that that percentage would have amounted to $2,794.09 and since the amount awarded, namely, $2,000.00 does not correspond to any percentage specified in the contract.

(c) It is submitted that the reasonable value of plaintiffs' service was the basis of the award made by the jury.

B

It is the judgment of the trial court alone which constitutes res judicata.

While there has been considerable discussion as to the meaning to be attributed to the opinion rendered by the Supreme Court in the former case, *Denio* v. *City of Huntington Beach,* 22 Cal. 2d, 518, 140 Pac. 2d, 392 (R. 46 being plaintiffs' Exhibit 6 received in evidence R. 57, 60), it is the judgment of the trial court and that alone which constitutes *res judicata.* (*People* v. *Skidmore,* 27 Cal. 287; *Wixson* v. *Devine,* 60 Cal. 341; *Mattingly* v. *Pennie,* 105 Cal. 514, 39 Pac. 200; *Bank of American* v. *McLaughlin Land Co.,* 40 Cal. App. 2d, 620, 105 Pac. 2d 607; *Tomaier* v. *Tomaier,* 23 Cal. 2d, 754, 146 Pac. 2d, 905; *2 Freeman on Judgments,* Section 772, p. 1642).

C

The judgment in the former case established that plaintiffs were not entitled to recover more than the reasonable value of their services.

Under the authorities cited in Point 1, the judgment of the trial court not only established that plaintiffs were entitled to $2,000.00 plus the cash retainer for their services,

but also established that they were entitled to no more. They rendered no further services (Exh. 1, Cl. Tr., pages 72-73, 150-151, 202, 425, 428, 461).

D

The judgment in this case amounts to an award of exemplary damages or compels the defendant to make to plaintiffs a gift of its property.

If we are correct in our contention that the judgment in the former case was for the reasonable value of plaintiffs' services and that they were entitled to no greater recovery, then as they have performed no further services, the award in this case cannot be compensatory in character. It must, therefore, constitute either exemplary damages against the defendant or a compulsory gift by defendant to plaintiffs.

E

Exemplary damages may not be awarded in this action.

In the first place exemplary damages may only be awarded in California in certain specified cases.

The applicable provisions of California Civil Code sec. 3358 are:

> "Notwithstanding the provisions of this chapter, no person can recover a greater amount in damages for the breach of an obligation than he could have gained by the full performance thereof on both sides. . . ."

This is likewise the rule of decision in California. Thus it is said in *Haigler* vs. *Donnelly*, 18 Cal. 2d, 674, 680, 117 Pac. 2d, 331, 335.

> "Under this section exemplary damages may not be recovered in an action based upon a contractual obligation even though the breach of contract is wilful or malicious."

Again, exemplary damages may not be awarded against a municipal corporation. *Am. Jur.* Vol. 38, page 370, Sec. 663, *Newcastle Products* v. *School District, etc.*, 18 Fed. Supp. 335 (Pa.), *Costick* v. *City of New York*, 73 (N. Y. S. 835), *Chicago* v. *Martin* (Ill.), 95 Am. Dec. 590, *City Council* v. *Gilmer*, 33 Ala. 116.

An award of exemplary damages where none are allowed by law constitutes depriving the defendant of its property without due process of law in violation of the provisions of the XIVth Amendment to the Constitution of the United States. This point was specifically raised in the answer filed by the defendant (R. 17, 18 25).

F

If the judgment in this case did not constitute an award of exemplary damages, it compels a gift of defendant's property to plaintiffs.

This is true since if the award is not compensatory because full compensation has already been paid and if it is not by way of exemplary damages because such are not recoverable in this action, then it must be in the nature of a gift to plaintiffs of defendant's property.

However, irrespective of the above reasoning, the award constitutes a compulsory gift of defendant's property since it is a payment to plaintiffs for services in protracted litigation when on their own advice, no such litigation ever took place. The judgment compels a payment by a municipal corporation for services not rendered.

Anyone contracting with a governmental body does so with full knowledge of the constitutional and legislative restrictions on its power to contract. He knows that it cannot make a gift. He knows that it cannot contract to make a gift. He knows that a payment for services not rendered amounts to a gift. He, therefore, knows that the governmental body cannot contract to pay him for services unless he actually performs them. He knows that before he can

receive payment under such a contract he must have returned to that body a *quid pro quo*. He knows that if for any reason he is unable to render that *quid pro quo* he cannot receive the compensation provided for. In other words, his ability to render a *quid pro quo* for compensation paid him by the governmental body is a provision written into every such contract by the constitution itself and is a risk necessarily assumed when one enters into a contract with such governmental body.

Since a governmental body cannot pay for or contract to pay for services unless they are actually rendered, it follows that if such services in fact are not rendered there cannot be any recovery for these services, nor can there be a recovery under a contract calling for their rendition.

The authorities on this subject are numerous and uniform.

The constitutional provision is set forth in *Section 31, Article IV of the California Constitution.* The applicable part reads as follows:

> "Legislature shall have no power to give or to lend or authorize the giving or lending * * * nor shall have the power to make any gift or authorize the making of any gift of any public money or thing of value to any individual * * *"

What constitutes a gift was defined in the case of *Conlin* v. *Board of Supervisors,* 99 Cal. 17, 21, 33 Pac. 753, 754, as follows:

> "The 'gift' which the legislature is prohibited from making is not limited to a mere voluntary transfer or personal property without consideration, which the Civil Code, Section 1146, gives as the definition of a gift; but the term, as used in the constitution, includes all appropriations of public money for which there is no authority or enforcible claim, or which rests upon some moral or equitable obligation, which in the mind

> of a generous or even a just individual, dealing with his own moneys, might prompt him to recognize as worthy of some reward. The legislature is to be regarded as holding the public moneys in trust for public purposes, and this limitation of the constitution is directed against its disposal of these funds except in accordance with such purposes."

In the case of *Molineux* v. *California,* 109 Cal. 378, 380, 42 Pac. 34, the plaintiff brought suit for interest on certain matured Indian War Bonds that were issued in 1851, claiming that the act of February 28, 1893, was retrospective and by its terms includes the right to recover legal interest from maturity.

The court in holding that this act violated Article IV, Section 31 of the Constitution states:

> "Inasmuch as prior to the passage of the act there was no liability for interest on the part of the state, it was not competent for the legislature to create such liability by the passage of the act. To increase the existing obligation for the coupons, by adding thereto the right to recover interest thereon, would be to make a donation to the holder of the coupons of the amount of the interest."

The case of *Taylor* v. *Mott,* 132 Cal. 497, 499, 56 Pac. 256, 257, involved the constitutionality of the Exempt Firemen's Relief Act of 1895. The Court states:

> "• • • all exempt firemen, by becoming residents and being enrolled, must be permitted to participate in the funds of the municipality when they become disabled, whether they have ever performed any service for such municipality or not. This constitutes a gift and makes the statute subject to the constitutional objections already pointed out and which have already been laid down by the Supreme Court in the following cases: *Conlin vs. Board of Supervisors,* 99 Cal. 17; 37 Am. St. Rep. 17; *Patty vs. Colgan,* 97 Cal. 251; *Bourn vs. Hart,* 93 Cal. 321, 27 Am. St. Rep. 203."

The cases discussing the gift section are numerous. In addition to the cases cited, we refer to the following: *Pacific Indemnity Co.* v. *Myers,* 211 Cal. 635, 296 Pac. 1084; *Potter* v. *Chambers,* 188 Cal. 55, 240 Pac. 826; *Alameda County* v. *Chambers,* 35 Cal. App. 537, 170 Pac. 650; *Sixth District etc. Assoc.* v. *Wright,* 154 Cal. 118, 97 Pac. 144; *Chapman* v. *State,* 104 Cal. 690, 38 Pac. 457; *Chapman* v. *City of Fullerton,* 90 Cal. App. 463, 468, 265 Pac. 1035, 1037.

The last above case was an action to enjoin the City of Fullerton from paying a claim of $2800.00 for alleged services performed partly within and partly without the City of Fullerton under some arrangement made with the City Marshal apparently ratified by the City Board of Trustees. The claim included both services and money expended for the benefit of at least three other cities in Orange County.

The Court states:

> "* * * the payment of appellant's demand by the City of Fullerton would result in the expenditure of an undetermined amount of funds of the City for the extra-territorial purpose of helping to police and pay the debts of other municipalities, which, of course, would be clearly contrary to law, and in violation of the trust imposed upon those having control of the city's funds. Section 31 Article IV, Constitution of California.

The point was made in the answer filed by the defendant that the award in this case constitutes a compulsory gift and thereby deprived the defendant of its property without due process of law in violation of the provisions of the XIVth Amendment to the Constitution of the United States (R. 17, 18).

POINT 4

On the merits of the case, the District Court of Appeal should have reserved the judgment of the trial court.

This point is urged upon the authority of *Story Parchment Co.* v. *Patterson Parchment Paper Co.,* 282 U. S. 555,

75 L.E. 544, which holds that on writ of certiorari to review a judgment the entire record is before this Court, with power to review the action of the lower court and direct such disposition of the case as that court might have made of it upon the appeal from the District Court.

In addition to the matters considered in this brief, it was the contention of your petitioner, both in the trial court and upon the appeal, that if the judgment in the former case did not estop the plaintiffs from denying that they had received the full reasonable value of their services and, consequently, were entitled to no further award, then:

(a) The basis of that judgment was so uncertain as to render it inoperative as *res judicata*. (*Washington etc. Co.* v. *Sickles*, 5 Wall 580; 18 L.E. 550; *Sanderson* v. *Niemann*, 17 Cal. 2d 563, 110 Pac. (2) 1025; *Horton* v. *Goodenough*, 184 Cal. 451, 460; 194 Pac. 34, 38; *Kidd* v. *Laird*, 15 Cal. 161; *Felton* v. *Smith*, 88 Ind. 194, 45 A.R. 454; *Penny* v. *Corey*, 147 Ala. 617, 41 So. 978)

(b) If the judgment in the former case did operate as *res judicata*, it did so merely by way of estoppel and not as a bar. Consequently, it did not prevent your petitioner from maintaining in this action defenses which had not been litigated or determined in the former action such as fraud in the inducement of the contract or its involuntary termination by reason of the frustration of its principal object. (*Cromwell* v. *Co. of Sac.*, 94 U. S. 351, 24 L.E. 195, 199; *Lillis* v. *Immigrant Ditch Co.*, 95 Cal. 553, 560, 30 Pac. 1108, 1110; *Freeman* v. *Barnum*, 131 Cal. 386, 389, 63 Pac. 691, 692; *Koeler* v. *Holt Mfg. Co.*, 146 Cal. 335, 337, 80 Pac. 73, 74; *Sanderson* v. *Niemann*, 17 Cal. 2d 563, 110 Pac. 2d 1025; *Title Guaranty & Trust Co.* v. *Munson*, 11 Cal. 2d 621, 631, 81 Pac. 2d 944, 949.)

(c) That the principal of *res judicata* never applies against a defense of unconstitutionality of a statute, contract or judgment. (*Branham* v. *Mayor and Common Counsel of San Jose*, 24 Cal. 585; *Freeman* v. *Barnum*, 131 Cal. 386, 63 Pac. 691.)

(d) That a judgment rendered in excess of the jurisdiction of the court cannot constitute *res judicata*. (*Scott* v. *McNeal*, 154 U. S. 34, 38 L.E. 896, 901.)

In the event that this petition is granted and a writ of certiorari is issued, your petitioner will file a brief setting forth in detail its position with regard to these points.

Conclusion

It is, therefore, respectfully submitted that this decision of the District Court of Appeal of the State of California, Fourth Appellate District should be reviewed by this Court for the reasons, as hereinabove shown, that said judgment denies to the Petitioner herein the equal protection of the laws of the State of California and deprives your Petitioner of its property without due process of law, all in violation of the provisions of the XIVth Amendment to the Constitution of the United States and that, therefore, a Writ of Certiorari should be granted in order that this Court may review said decision and finally reverse the same.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 559.

THE CITY OF HUNTINGTON BEACH, a municipal corporation,

Petitioner,

vs.

E. C. DENIO, G. A. HART, G. P. TAUBMAN, JR., and M. C. SIMPSON, partners, under the firm name and style of DENIO, HART, TAUBMAN AND SIMPSON,

Respondents.

Reply to Respondents' Brief in Opposition to Granting of the Petition for Writ of Certiorari to the District Court of Appeal of the State of California, Fourth Appellate District.

To the Honorable Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The reply brief filed by Respondents in this matter is chiefly remarkable for its entire avoidance of any discussion of the grounds upon which the writ of certiorari is sought; namely, a denial to Petitioner of the equal protection of the laws of the State of California, and that your Petitioner has been deprived of its property without due process of law.

Respondents do not dispute (1) that in the original action against Petitioner they sought recovery of 10% of certain monies received by Petitioner amounting to $2,-794.09; (2) that they recovered judgment only for the sum of $2,000.00; (3) that such a judgment has two aspects, being a judgment that the plaintiffs therein were entitled to recover $2,000.00, and also being a judgment that they were not entitled to recover any greater sum; (4) that the judgment in the present case applies the doctrine of *res judicata* in favor of Respondents to the first aspect of that former judgment but refuses to apply it in favor of Petitioner to the second aspect of that same judgment. Respondents advance no reason, or even argument, why such action of the California courts does not deprive your Petitioner of the equal protection of that doctrine.

Respondents likewise fail to point out what is the basis in law upon which your Petitioner is deprived of a full 10% of the moneys received by it. Respondents fail to advance any reason, or even argument, why such a judgment for 10% of certain moneys based solely on a prior award of 7.1% thereof does not deprive your Petitioner of at least the excess over said 7.1% without due process of law.

Respondents attempt to construe the opinion of the California Supreme Court in the former action into a holding that they were entitled to recover the full contract percentages. Actually all that court held was [R. p. 116]:

> "We conclude that the evidence is not insufficient to support any essential implied finding, and that no prejudicial error has been shown."

The only finding essential to support the judgment was that respondents had rendered services to and at the request of Petitioner of the value of $2,000.00.

Moreover, it is the judgment as rendered by the trial court and not any opinion rendered by a court on appeal that alone constitutes *res judicata.* (See Brief in Support of Petitioner, p. 29, to which Respondents make no answer.)

Respondents say that Petitioner cannot complain because the verdict in the former action was less than Respondents were entitled to. This is assuming that such verdict was too small, an assumption which runs directly contrary to the entire theory of the doctrine of *res judicata,* upon which alone Respondents can rely. Moreover, Petitioner is not complaining of the amount of that verdict. Petitioner is standing on that verdict. (See Brief in Support of Petition, pp. 16, 17.)

Respondents claim that the judgment in the first action could not be for the reasonable value of their services. They base this contention (Rep. Br. pp. 6 to 8) upon the proposition that a common count is often deemed merged into a more detailed count in a complaint. They attempt no answer to the authorities cited by us that this is not always so and that in this case they are estopped to contend that any such merger existed. (Brief in Support of Petition pp. 24-29.) They do not dispute that the basis of the verdict in that former case had to be one of three things: (1) The contract percentages; (2) A purely arbitrary award; or (3) The reasonable value of Respondents' services. Obviously, the verdict was not based on the contract percentages. It is presumed that it was not a purely arbitrary award. This leaves only the

reasonable value of Respondents' services as a possible basis for that verdict. Respondents suggest no other basis whatsoever.

Next Respondents say (Rep. Br. pp. 9, 10) that the decision of the State District Court of Appeal in this case is correct in holding that the former judgment constituted *res judicata*. That is the point of this petition for writ of certiorari. If the judgment in the former action constitutes *res judicata* as to this action, then it constitutes *res judicata* partially in favor of Respondents and partially in favor of your Petitioner, and the California courts were not justified in applying the judgment solely as *res judicata* in favor of Respondents.

Finally Respondents contend that the State District Court of Appeal, in affirming the judgment in the original case, passed adversely to Petitioner's contentions with regard to certain constitutional points raised in the petition for writ of certiorari. If it had not done so there would have been no necessity for this petition.

Wherefore, it is respectfully submitted that the petition for writ of certiorari should be granted so that your Petitioner will not be denied the equal protection of the laws of the State of California, or be deprived of its property, or any part thereof, without due process of law.

WALTER O. SCHELL,
Counsel for Petitioner.

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Of Counsel for Petitioner.

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IN THE

Supreme Court of the United States

October Term, 1946.
No. 559.

THE CITY OF HUNTINGTON BEACH, a municipal corporation,

Petitioner,

vs.

E. C. DENIO, G. A. HART, G. P. TAUBMAN, JR., and M. C. SIMPSON, partners, under the firm name and style of DENIO, HART, TAUBMAN AND SIMPSON,

Respondents.

Respondents' Brief in Opposition to Granting of the Petition for Writ of Certiorari to the District Court of Appeal of the State of California, Fourth Appellate District.

To the Honorable Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Statement of Case.

Respondents respectfully submit that this is a case brought by attorneys at law, all of whom are residents of the State of California, against a California municipality for attorneys' fees under a contingent fee contract made and to be performed in California. This case was tried

before a jury demanded by the defendant and the jury rendered a verdict in favor of the plaintiffs. The defendant appealed and the case was affirmed by the Supreme Court of California. (*Denio v. City of Huntington Beach*, 22 Cal. (2d) 580, 140 P. (2d) 392. [Tr. of Rec. p. 96.]

The judgment in this case was accepted as final by the petitioners. The present action was then instituted for another installment of fees under the contingent contract, the plaintiffs setting up the fact that the former judgment was *res judicata*, and that is the only question involved here, and is purely a question for the state courts. This issue was tried by the Superior Court and a decision and judgment rendered in favor of respondents. [Tr. of Rec. pp. 27 to 37, incl.] On appeal. the judgment of the Superior Court was affirmed. [Tr. of Rec. p. 70.] A hearing was denied by the Supreme Court. [Tr. of Rec. p. 96.] Both the decisions of the Supreme Court and the District Court of Appeal of the State of California followed well-established principles of California law, and we submit that no Federal question or question under the Federal Constitution is involved in this action.

ARGUMENT.

I.

A Contingent Contract in California Is Valid, and for Wrongful Discharge Respondents Are Entitled to Recover the Compensation Specified by the Terms of Such Contract of Employment.

This point is completely determined by the decision of the Supreme Court in *Denio v. Huntington Beach*, 22 Cal. (2d) 580; [Tr. of Rec. pp. 96, 107];

> "We conclude that the contract of employment here involved is valid, and binding upon defendant city, and that for the breach of that contract by defendant, *i. e.*, the discharge of plaintiffs if such discharge was wrongful, plaintiffs are, under the long-established rule in California, entitled to recover the compensation specified by the terms of such contract of employment. (See *Baldwin v. Bennett* (1854), 4 Cal. 392; *Cole v. Superior Court* (1883), 63 Cal. 86, 88 (49 Am. Rep. 78); *Webb v. Trescony* (1888), 76 Cal. 621, 623 (18 P. 796); *Bartlett v. Odd Fellows Savings Bank* (1889), 79 Cal. 218 (21 P. 743, 12 Am. St. Rep. 139); *Carter v. Baldwin* (1892), 95 Cal. 475 (30 P. 595); *Kirk v. Culley* (1927), 202 Cal. 501, 506 (261 P. 994); *Elconin v. Yalen* (1929), 208 Cal. 546, 549 (282 P. 791); *Zurich G. A. & L. Ins. Co. Ltd. v. Kinsler* (1938), 12 Cal. 2d 98, 100-101 (81 P. 2d 913); *Echlin v. Superior Court* (1939), 13 Cal. 2d 368, 375 (90 P. 2d) 63, (fol. 110), 124 A. L. R. 719); *Countryman v. California Trona Co.* (1917), 35 Cal. App. 728, 736 (170 P. 1069); *McCully v. Gano* (1931), 116 Cal. App. 695, 698-699 (3 P. 2d 348); *Green v. Sherritt* (1936), 17 Cal. App. 2d 732, 736-737 (62 P. 2d 769).)" [Tr. of Rec. p. 107.]

In the first action it was the contention of petitioner herein that the defendant abandoned their contract and that therefore their discharge was not wrongful. This is completely answered by the decision of the Supreme Court in which the evidence is fully set out. [Tr. of Rec. p. 108.]

II.

Petitioners, Under California Law, Cannot Complain Because the Verdict Was Less Than the Respondents Were Entitled To.

Petitioners complain that because the verdict in the first suit was $2000.00 when under the evidence respondents should have been entitled to $2794.09, that therefore the judgment in the first case could not be *res judicata*, and that by so applying the judgment they are deprived of their property without due process of law. The Supreme Court of California passed upon this question in the first appeal when they state in their opinion:

> "The fact that the verdict rendered awards plaintiffs less than they might be entitled to recover does not prejudice defendant." [Tr. of Rec. p. 115.]

This is in direct accordance with prior decisions of the Supreme Court of California. In *McClung v. Moore*, 138 Cal. 181, 182, the Supreme Court of California says:

> "The jury disregarded the instruction as to the amount of its verdict, thereby giving plaintiff a verdict for $2,223.77 less than he should have had under the express agreement. While the plaintiff might have appealed and claimed that the verdict was injurious to him by being for less than he was entitled to under the agreement, it cannot be claimed by defendant that the error committed by the jury injured

him. He does not contend that the evidence would not have supported a verdict for the full amount claimed by plaintiff. If it would support a verdict for $2,988.50, it supports the verdict for $764.73. The greater includes the less."

McClung v. Moore, 138 Cal. 181, 182.

In *Guitron v. Rodriquez,* 105 Cal. App. 513, 515, the Appellate Court of the State of California says:

"It is also argued that the verdict cannot be justified because under the provisions of section 3310 of the Civil Code the full contract price is the measure of the detriment caused by the breach of a buyer's agreement to accept and pay for personal property whereas in this action the jury awarded the plaintiffs no more than $1000. If the point were raised by the plaintiffs we might be constrained to give it some consideration, but we cannot perceive how the defendants can possibly be prejudiced through a verdict of $1,000 instead of $2,700."

Guitron v. Rodriquez, 105 Cal. App. 513, 515.

In *Crocker-Huffman Land and Water Co. v. Goss,* 203 Cal. 233, the Supreme Court of California says:

"The balance alleged and found to be due being $74.88 less than the amount actually due as shown by the evidence, and the difference being in appellant's favor, the latter has no ground of complaint by reason of said inaccuracy."

Crocker-Huffman Land and Water Co. v. Goss, 203 Cal. 233, 235.

To the same effect are the following California cases:

Archibald v. Schultz, 14 Cal. App. (2d) 320;

Orfanos v. California Insurance Company, 29 Cal. App. (2d) 75;

Del Barrio v. Sherman, 16 Cal. App. (2d) 407;

Payne v. Commercial National Bank of Los Angeles; 177 Cal. 68.

Baroni v. Musick, 3 Cal. App. (2d) 419;

Manuel v. Calistoga Vineyard Co., 17 Cal. App. (2d) 377;

Babcock v. Olhasso, 109 Cal. App. 534, 536;

California C. F. Corp. v. Provision Co., Inc., 119 Cal. App. 738, 740;

Roloff v. Hundeby, 105 Cal. App. 645, 653;

McPherson v. Milling Co., 44 Cal. App. 491, 494.

III.

Under No Possible Construction Could the Action of the Respondents Against the Petitioners in the California Courts Be Construed to Be an Action in Quantum Meruit.

Petitioners argued at great length that the verdict of the jury must have been based upon the second cause of action in plaintiff's complaint which is on the common count of money had and received, and that therefore the verdict of the jury must have been for only the reasonable value of services. We respectfully submit that this action was on an express contract and that the cause of action for money had and received is not an action in *quantum meruit.* The Supreme Court of California in its decision determines that the action was upon the express contract.

[Tr. of Rec. p. 99 *et seq.*] The first cause of action of the complaint was entirely upon the contract. [Tr. of Rec. p. 1.] The second cause of action is purely for a cause of action for money had and received. [Tr. of Rec. p. 9.] Referring to money had and received it is stated in 17 *Cal. Jur.*, Section 14, page 618, as follows:

> "It will lie to recover money collected by the defendant which belongs to the plaintiff but has not been paid over to him; money received and held by the defendants as trustees for the plaintiff. . . ."
>
> 17 *Cal. Jur.*, Sec. 14, p. 618.

6 *Corpus Juris*, Section 336, page 755:

> "Where moneys to which the attorney is equitably entitled have come into the hands of the client, the former may sue as for money had and received."
>
> 6 *Corpus Juris*, Sec. 336, p. 755.

See, also:

> 7 *Corpus Juris Secundum*, Sec. 197, p. 1104.

As a matter of pleading in California, if the facts are stated in one cause of action and another cause of action merely sets forth the common count of money had and received, both must be considered together. The Court says in *Hays v. Temple*, 23 Cal. App. (2d) 690:

> "As to the third count, which was a common count for money had and received, the demurrer was likewise properly sustained. It is the established law of California that ,if plaintiff is not entitled to recover under one count in a complaint wherein all the facts

upon which his demand is based are specifically pleaded, it is proper to sustain a demurrer to a common count set forth in the complaint, the recovery under which is obviously based on the set of facts specifically pleaded in the other count. (*Harris v. Kessler,* 124 Cal. App. 299, 303 (12 Pac. (2d) 467); *Powers v. Freeland,* 114 Cal. App. 146, 150 (299 Pac. 736).)"

Hayes v. Temple, 23 Cal. App. (2d) 690.

In *Harris v. Kessler,* 124 Cal. App. 299, 303, the Court says:

"Nor do we find any ground for reversal because of the order of the court sustaining the demurrer to the second count in the cross-complaint without leave to amend. It was a common count for money had and received, the demand being for $16,636.92, which was the identical amount claimed under the first count, and manifestly was based on the same state of facts set forth in the first count. It follows, therefore, that if defendant was not entitled to recovery under the first count, wherein all of the facts upon which the demand was based were specifically pleaded, he was not entitled to recover the same under a common count."

Harris v. Kessler, 124 Cal. App. 299, 303.

See, also:

Hays v. Temple, 23 Cal. App. (2d) 690, 695;

Orloff v. Metropolitan Trust Co., 17 Cal. (2d) 484, 489.

IV.

The Decision of the Appellate Court That the First Action Was Res Judicata as to the Present Action Is Supported by California Authorities.

". . . When an issue has been litigated all inquiry respecting the same is foreclosed, not only as to matters heard but also as to matters that could have been heard in support of or in opposition thereto."

Price v. Sixth District Agricultural Assn., 201 Cal. 502, 511;

Andrews v. Reidy, 7 Cal. (2d) 366;

Sutphin v. Speik, 15 Cal. (2d) 195;

DeHart v. Allen, 26 Cal. (2d) 829.

The reason for the rule is stated in *Sutphin v. Speik, supra*, as follows:

"A party cannot by negligence or design withhold issues and litigate them in consecutive actions. Hence the rule is that the prior judgment is *res judicata* on matters which were raised or could have been raised, on matters litigated or litigable."

Sutphin v. Speik, 15 Cal. (2d) 195, 202.

There have been only two exceptions to this rule in California modern decisions. *English v. English*, 9 Cal. (2d) 358, determines that the rule does not apply to default judgments, and *Sanderson v. Neiman*, 17 Cal. (2d) 563, determines that the rule does not apply to judgments of the

small claims court because of the informal procedure in that court. It is interesting to note that this rule is in accordance with the latest expression of the Supreme Court of the United States:

> "In general a judgment is *res judicata* not only to all matters litigated and decided by it, but as to all relevant issues which could have been but were not raised and litigated in the suit."
>
> *Heiser v. Woodruff*, 90 L. Ed., Advance Opinions 828, 834.

The case at bar is simply an action for the recovery of another installment under the same contract which was litigated and found valid and binding upon the petitioner in its first cause of action. The Appellate Court, in the decision attacked in the case at bar, states as follows:

> "It would be inconsistent in this case to admit evidence and to permit a decision which would have the effect of destroying a contract for compensation, the validity and binding effect of which, and the right to recover compensation under which, was specifically upheld in the former action." [Tr. of Rec. p. 75.]
>
> "The basic facts and the existence of the obligation here sued upon have been judicially determined and the final judgment in the former action is controlling here. A contrary decision here would have destroyed the rights of the respondents in a contract, the validity and binding effect of which was upheld in the former action." [Tr. of Rec. p. 77.]

V.

The Superior Court Correctly Determined the Case on the Merits and the District Court of Appeal Properly Affirmed the Same, and There Is No Constitutional Question.

Petitioners at great length set out excerpts from the testimony in the first case to show that they should have won. Their argument was properly made before the jury which did not believe their theory. The Supreme Court affirmed the first case. We shall not burden this court by setting out the facts of the first case. Suffice to say that it was an action for attorneys' fees on a contingent contract; that there was ample evidence to show that the contract had been performed by the respondents and that the respondents continued at all times ready, willing and able to continue performance; that respondents were discharged wrongfully and without cause; that petitioners set up a general denial, abandonment of the contract, invalidity of the contract and the constitutional question as to the ability of the City to enter into the contract, all of which were resolved against respondents by the jury and affirmed by the Supreme Court. (*Denio v. City of Huntington Beach,* 22 Cal. (2d) 580.) [Tr. of Rec. p. 96.] A fair résumé of the facts by a court and not a partisan résumé of these facts by any party are set out in the opinion of the Supreme Court in the first case and are found in the copy of the opinion set out in the *Transcript of Record* commencing with the first paragraph on page 100 and extending to the end of the first paragraph on

page 107. This statement of the case on the merits was adopted by the Appellate Court of the State of California, Fourth Appellate District, which opinion is set forth in full commencing with page 71 of the *Transcript of Record.* The court states in the opinion as follows:

> "This action involves the same contract and the same general facts as those in *Denio v. City of Huntington Beach,* 22 Cal. (2d) 580. The facts are rather fully stated in the opinion in that case and need not be repeated here." [Tr. of Rec. p. 71.]

In the first case the Supreme Court tersely resolved the merits in favor of respondents when it said:

> "As was stated by the District Court of Appeal in *Pacific Finance Corp. v. City of Lynwood, supra* (at pp. 518-519 of 114 Cal. App.): '. . . we know of no reason why a city, as well as an individual, should not be expected to keep faith with those with whom it contracts, or else respond in damages for its failure." [Tr. of Rec. p. 107.]

The Appellate Court further disposes of the constitutional questions in its opinion, basing the same upon the verdict of the jury in the first case and the determination of the Supreme Court in that case, that the contract was a valid one for compensation for services. The Appellate Court on the constitutional questions endeavored to be raised, states as follows:

> "Some contention is made that constitutional questions were raised in this action which were not raised

or considered in the former action, in that it was here attempted to raise the issue that compensation for services not actually performed is tantamount to a gift and that exemplary damages may not be awarded against a municipality. Not only could these questions have been raised in the former action (*Andrews v. Reidy*, 7 Cal. (2d) 366), but in view of the judicial determination that this was an enforceable contract for compensation for services no question of gift or exemplary damages is here involved." [Tr. of Rec. p. 78.]

It is interesting to note that while the decision in the first case by the Supreme Court was by a 4 to 3 majority, yet in the case at bar there was no dissent to the order denying a hearing in the Supreme Court after decision of the District Court of Appeal;

"In the Supreme Court of California in Bank.

Denio, *et al.* v. The City of Huntington Beach.

ORDER DENYING HEARING AFTER JUDGMENT BY DISTRICT COURT OF APPEAL

Appellant's petition for hearing denied.

Dated, Jul. 2, 1946.

GIBSON, Chief Justice."

[Tr. of Rec. p. 96.]

Conclusion.

In view of the fact that this is simply an action for compensation by California attorneys at law against a California municipality, made, executed and to be performed in the State of California; that the case has been fully and fairly decided and in accordance with a long line of California decisions, and that there is neither a federal or constitutional question involved, we submit and earnestly urge that the Petition for a Writ of Certiorari be denied by the Supreme Court of the United States.

Respectfully submitted,

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